TREASON AND TYRANNY: SOME THOUGHTS ON THE TRIAL AND EXECUTION OF CHARLES I

by Jacquelin Collins

The outstanding political fact of seventeenth-century Britain was the execution of Charles I on January 30, 1649. King Charles's fatal error was to exasperate beyond repair his most dangerous opponents. These men, convinced of Charles's bad faith and of his unwillingness even after his defeat on the field of battle to discuss substantive terms for settling the government, finally resorted to the expedient of cutting off his head. This, of course, was not the justification the regicides gave for their actions. William Goffe, at a prayer meeting in the New Model Army at the beginning of the Second Civil War in 1648, spoke of their being "led and helped to a clear agreement . . . to go out and fight against those potent enemies" and of their "very clear and joint resolution . . . to call Charles Stuart, that man of blood, to an account for that blood he had shed, and mischief he had done to his utmost, against the Lord's cause and people in these poor nations."[1]

At his trial Charles was formally charged with having "a wicked design to erect and uphold in himself an unlimited and Tyrannical Power to rule according to his Will, and to overthrow the Rights and Liberties of the People." He had "traitorously and maliciously levyed War against the present Parliament, and the People therein represented." And in conclusion, "the said Charles Stuart hath been, and is the Occasioner, Author, and Continuer of the said unnatural, cruel and bloody Wars, and therein guilty of all the Treasons, Murders, Rapines, Burnings, Spoils, Desolations, Damages, and Mischiefs to this Nation, acted and committed in the said Wars, or occasioned thereby." The special tribunal found the king guilty, and "For all which Treasons and Crimes this Court doth adjudg, That he the said Charles Stuart, as a Tyrant, Traitor, Murderer, and publick Enemy to the good People of this Nation, shall be put to death by the severing of his Head from his Body."[2] Charles, on the scaffold three days later, estimated his situation otherwise: "If I would have given way to an Arbitrary Way, for to have all Laws changed according to the Power of the Sword, I needed not to have come here; and therefore I tell you (and I pray God it be not laid to your Charge) that I am the Martyr of the People."[3]

Interesting as are the personal and political troubles of Charles and Britain, my concern is not with them, but with the association of the ideas of treason and tyranny with the idea, now become a fact, that a king could be brought to trial and executed for what a victorious opposition asserted were the misdeeds of his government, and finally with the crisis caused by the resulting confusion as to just what was the law and the foundation of government. This raises the incident above the personal tragedy of a king who mismanaged and lost his kingdom and forfeited his life into the bargain.

English kings had lost their thrones and lives before, in 1327 and 1399, not to mention in 1066 and 1485 and even 1461. Previously, they had either been killed in battle fighting to retain their thrones, or they simply had been forced to abdicate. Though in the latter situation death had usually come quickly in the wake of abdication, even as a consequence of it, death was not a necessary legal corollary of removal from office. Not until Charles I in 1649 was a king sentenced to death for his actions as king; not till then had a king, in the words attributed to Oliver Cromwell, had his head cut off "with the crown on it."[4]

Michael Walzer, in his provocative book *The Revolution of the Saints: A Study of the Origins of Radical Politics,* puts at the head of his list of new elements illustrating the effect of a new revolutionary politics "the judicial murder—and not the assassination—of King Charles I; the trial of the king in 1649 was," he asserts, "a bold exploration into the very nature of monarchy rather than a personal attack upon Charles himself."[5]

Cecily Veronica Wedgwood, in her recent essay "The Trial of Charles I," is characteristically more interested in the narrative of events than in the ideas behind them. Not surprisingly, she comes to the conclusion that, though the trial "remains the dramatic high point of the struggle between King and Parliament, its political significance was, in the long run, far less than was anticipated. It did not end the monarchy; it did not create a Republic. It was an incident far more remarkable in itself than in its consequences." Nevertheless, after showing the resoluteness of the regicides and the fanaticism of the king, she says in passing that the "trial presented, in its most dramatic form, a confrontation between two irreconcilable theories of government."[6]

Not quite so recently, Charles Howard McIlwain, in the concluding chapter of his *Growth of Political Thought in the West,* focused briefly on the significance of English constitutional developments in the seventeenth century. Following with approval Jean Bodin's late sixteenth-century theory of sovereignty, McIlwain asserted that

> the English monarchy, and, in fact, every monarchy of the highest type existing in a free state, must needs be "absolute" if it is to effect its great purpose of securing and enforcing peace and justice; a monarchy founded in law and based on ancient custom, in which the "sovereign" is free from ordinary law but bound by those fundamental rules which define his authority in the state; and in every monarchy of this highest type these fundamental rules include the medieval principle that the subjects' goods are their own, to be taken by the ruler only "by the common assent of all the realm and for the common profit thereof."[7]

To McIlwain, the "English civil wars of the seventeenth century"—if not specifically the trial and execution of the king—"roughly threw English political thought permanently out of its true orbit and substituted a theory of might for a theory of law."[8] Whether or not so absolute a judgment should be allowed to stand unchallenged, there is no reason to quibble with McIlwain's understanding of medieval theory or with his assertion of the

importance of what was happening in England in the seventeenth century.

The medieval English constitution was the product of the balance between king and feudal barons, between order and violence.[9] Medieval regard for the sanctity of law and custom was due not to the character of a people naturally litigious and respectful of the law but to the practical needs of a violent age, where men understood the harsh realities of a society whose members were ever ready to resort to armed self-help. In the Middle Ages the state of nature, which in Hobbesian fashion lurked behind civilized society and threatened to return at any moment, was not Hobbes's war of individuals but of families and factions. The practical escape was not to the sure protection of Hobbes's almighty king but to the relative security of a limited violence, regulated by laws and custom and in fact reflecting the actual power structure of the age. The authority of each man or institution was appropriate to his or its proper sphere. Kings were sovereign in the administration of their kingdoms, but so were barons in their baronies; and lesser men and institutions possessed just as absolutely their own particular and appropriate rights. The law reflected this balance. And though the law's importance for maintaining the scarce—and therefore precious—peace was recognized, what safeguarded the law's existence and guaranteed its enforcement was never forgotten. The last resort was that of the barons at Runnymede. It is easily understandable that the law, being so important, was thought to be beyond the ability of man to create or alter.

In England at the beginning of the seventeenth century the traditional balance between prerogative and law still obtained. Despite the writings of Jean Bodin and others, however, the practical maintenance of this balance was sometimes proving difficult. In the judgment of Chief Faron Fleming in Bate's case in 1606 the formulas were correct, but their interpretation was tilted in favor of the king:

> The King's power is double, ordinary and absolute, and they have several laws and ends. That of the ordinary is for the profit of particular subjects, for the execution of civil justice . . . ; and this is exercised by equity and justice in ordinary courts, and . . . is nominated . . . common law; and these laws cannot be changed without parliament. . . . The absolute power of the King is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people, and is *salus populi*; as the people is the body, and the King the head; and this power is . . . most properly named policy and government; and as the constitution of this body varieth with the time, so varieth this absolute law, according to the wisdom of the King, for the common good.[10]

Two years earlier, in the Apology of the House of Commons, can be found the same traditional terminology, but with a somewhat different emphasis. Here the members of the Commons were concerned with "misinformation" dangerously possessed by the king:

> Against which assertions, most gracious Sovereign, tending directly and apparently to the utter overthrow of the very fundamental privileges of our House, and therein of the rights and liberties of the whole Commons of your realm of England . . . we . . . do expressly protest, as being derogatory in the highest degree to the true dignity, liberty and

> authority of your Majesty's high court of parliament and consequently to the rights of all your Majesty's said subjects and the whole body of this your kingdom; and desire that this our protestation may be recorded to all posterity. . . . [A]gainst these misinformations we most truly avouch . . . that our privileges and liberties are our right and due inheritance, no less than our very lands and goods.[11]

These statements are not out of line with the aphorism from Seneca, "to kings belongs authority over all; to private persons, property," which McIlwain chose to conclude his study of medieval political thought and which he asserted "best comprises the living political conceptions of the later middle ages."[12] Yet, in the differences between the two statements and between the understandings they portray—specifically as to the disputed boundary between "authority" and "property"—one can see coming the troubles that later were manifested so graphically in the Puritan Revolution.

The origin and causes of the Puritan Revolution have been one of the hottest topics of English historical research and controversy for more than two decades.[13] Perhaps it is enough to say that by the second quarter of the century the English government and church no longer satisfied as many people, especially those with a positive basis for political power and influence, as they left uneasy and annoyed. Once the revolution had begun, things became increasingly blurred. Yet a few signposts can be discerned. The king's free exercise of his prerogative in law courts, in taxation, and in summoning parliament was attacked and curtailed. His advisers, most especially the Earl of Strafford and Archbishop William Laud, were arrested and, interesting for our purposes, charged with treason, which offense was beginning its transmogrification from a crime against the king and through him the kingdom and people to a crime against the kingdom and people directly, as we have already seen in the case of Charles I.

The breakdown of government brought the refurbishing of old ideas and the generation of new sufficient to influence either directly or indirectly all the revolutions that have taken place in Europe since then. The practical problem of settling England's government once the king and kingship had been destroyed proved to be only temporary. After a decade of constitutional experimentation and after the death of Cromwell, the only man with sufficient talent and force of character to maintain order amidst instability, the monarchy was happily restored. The restoration of Charles II in 1660, like the ending of a lovers' quarrel, brought a happy reunion but no settling of the issues that had caused the trouble in the first place. Two practical lessons had nevertheless been learned: that intransigence in a king could be fatal, and that drastic remedies effected by disgruntled subjects could prove fruitless. The second time around, in 1688 and 1689, everyone played his part to perfection: James II promptly ran away; William and Mary, his successors, arrived on cue and found immediate acceptance; and parliament quickly effected a moderate and popular settlement. Can one wonder that the English, recalling the great rebellion of a half century before, called this revolution glorious? Parliament, having presided over the execution of one

king, the firing of a second, and now the taking on of a third, was demonstrably the dominant element in the government of the kingdom. And more important, England had achieved a constitutional stability, which for the better part of a century it had been without, and on which basis in the next several decades a new political stability could be built.[14]

How different was the year of the trial and execution of Charles I, when the minimal existing stability was but that of victorious arms. Algernon Sidney, when he discovered that without his permission he had been named to the commission to try the king, protested "first, the king could be tried by no court; secondly, that no man could be tried by that court."[15] This is similar to Charles's own refusal to acknowledge the court that tried him and to his assessment that, "I speak not for my own Right alone, as I am your King, but also for the true liberty of all my Subjects, which consists not in the power of Government but in living under such Laws, such a Government, as may give themselves the best assurance of their Lives, and property of their Goods."[16] In this sense, Charles was, as he said, "the Martyr of the People," or at least a martyr for the laws and government as he understood them. To Sidney's denial that the king could be tried, Cromwell made his famous reply, "I tell you we will cut off his head, with the crown on it."[17] Especially in the face of the king's posture at his trial and the heroic dignity of his death, the claims of the regicides seem less the assertion of legal principle than the angry resolution of frustrated preeminence. In the trial of the king, in the abolition of the monarchy and of the House of Lords, and in the proclamation that henceforth England was a Commonwealth, there is a sense of overriding expediency. Cromwell and the others who were directing things had the power, and thus to all practical purposes what they ordained was law. Here in fact and deed was the embodiment of Thomas Hobbes's Leviathan.

Quentin Skinner has asserted that this is true in more than a figurative sense, that Hobbes, whose *Leviathan* was published in 1651, and who the following year ended his eleven-year exile and took up residence in England, was the last and most important of a series of writers—Francis Rous, Anthony Ascham, Marchamont Nedham, and Francis Osborne among others—advocating the *de facto* acceptance of the government of the Commonwealth and basing their arguments on progressively more secular grounds. The common basis in Hobbes and in "the other lay theorists of *de facto* powers, lies in the claim that there is a mutual relation between the duty of the sovereign to protect his subjects and the duty of his subjects to obey." Skinner quotes Hobbes to emphasize the latter's "claim that 'the end of obedience is protection' " and his acknowledgment that the Leviathan "was written 'without other design than to set before men's eyes the mutual relation between protection and obedience.' "[18]

Arguments of might making right have, however, never seemed very satisfying, and seldom is the justification of anything left on that basis alone.

The regicides certainly attempted to justify their cutting off the king's head with other arguments. Even Hobbes, the most resolute of those arguing for obedience to a government newly established by conquest, does not rest with force as the ultimate justification of government. Perez Zagorin has asserted, rightly I feel, "that subjects, in Hobbes's view, retain significant original liberties in civil society." And again, "for Hobbes it remains emphatically the case that the sovereign exists for the people's sake, and not the other way around. Because of this, he was compelled to admit that the sovereign had a moral obligation, the obligation to act rationally." And Hobbes is quoted, "he, who being placed in authority, shall use his power otherwise than to the safety of the people, will act against the reasons of peace, that is to say, against the laws of nature."[19]

Morton A. Kaplan went further in the same direction, seeing a distinction in Hobbes between men and subjects: "It is the subject, the artificial member of that artificial person the state, who is bound by artificial chains, i.e., by the law. The subject lacks rights; man does not." "[W]ith respect to a particular and existing state, men, as distinguished from subjects, have an interest distinct from that of the state." "[N]atural men need not perish with the state and their actions ought always to be governed by their reason." Kaplan, to my satisfaction, answers the question he asked in the title of his article, "How Sovereign is Hobbes' Sovereign?": "Thus Leviathan, as a theory of sovereignty, establishes only a sovereignty over subjects, not over natural men. It does not—and is not intended to—establish an extra-individual source of obligation, whether by consent or by any other means."[20]

John Austin, the nineteenth-century follower of Thomas Hobbes and of Jeremy Bentham, emphasized the positive character of law deriving its validity and force solely from the all-powerful sovereign lawgiver. Yet he also acknowledged the continuing responsibility of the sovereign to the people, based not on the positive law but on its utilitarian foundation.[21] Especially interesting is Austin's description of the first of what he identified as Hobbes's two "capital errors":

> He inculcates too absolutely the religious obligation of obedience to present or established government. He makes not the requisite allowance for the anomalous and excepted cases wherein disobedience is counselled by that very principle of utility which indicates the duty of submission. Writing in a season of civil discord, or writing in apprehension of its approach, he naturally fixed his attention to the glaring mischiefs of resistance, and scarcely adverted to the mischiefs which obedience occasionally engenders. And although his integrity was not less remarkable than the gigantic strength of his understanding, we may presume that his extreme timidity somewhat corrupted his judgment, and inclined him to insist unduly upon the evils of rebellion and strife.[22]

Must all end then in confusion? A king, executed for treason, is, in fact, a martyr of the people and for the security of the laws that he himself had surely violated. Regicides call upon the law and the righteousness of God to justify their obviously illegal trial and execution of the king. Hobbes's seeming assertion that might makes right is perhaps not as well founded as

it at first appears. And even John Austin, whose absolute sovereignty is lamented and scorned, seems less than steadfast in his awful claims. "Vanity of vanities, saith the preacher, vanity of vanities; all is vanity."

Perhaps it would not be too great a violence to McIlwain and the thought of the Middle Ages to suggest that the distinction between policy, or administration or royal prerogative, and the law should be extended and liberalized; to suggest that there must invariably be a distinction between, on the one hand, government and administration as expressed in institutions, statutes, and even precedents and custom, and, on the other, a popular and official sense of the fitting and appropriate, the just and the virtuous. This latter must by and large be unexpressed and inarticulate, for it is ever being forged anew in the white-hot spark of a troubled conscience confronted by its duty, and by institutions stretched by circumstances beyond the limits of established answers and procedures. Such was the situation at the trial and execution of Charles I in 1649, and such was the environment that produced not only Thomas Hobbes but other happier and more optimistic writers, all of whom felt compelled by the times to articulate their thoughts and put them on paper. Perhaps the proper conclusion is to be drawn not from the anarchy of ideas and the rule of force but from the need broadly felt by men to justify what they are doing by an appeal to an outside reference, divine ordinance, custom, a concept of justice dictated by a rule of reason, or even a generous understanding of utility. If there exists a higher law than that of might or of transient expediency it is surely to be found in the troubled minds and hearts of those who are confronted with such experiences as the trial and execution of Charles I.

NOTES

1. *Somers Tracts,* VI (1811), 501, quoted in *Oxford History of England,* ed. Sir George Clark, Vol. IX, Godfrey Davies, *The Early Stuarts, 1603-1660,* 2nd ed. (Oxford: Clarendon Press, 1959), p. 154.

2. John Rushworth, *Historical Collections,* 8 vols., 2nd ed. (London, 1722), 7:1396-98.

3. Ibid., pp. 1429-30.

4. *Sidney Papers,* ed. R. W. Blencowe (1825), p. 237, quoted in Wilbur Cortez Abbott, *The Writings and Speeches of Oliver Cromwell,* 4 vols. (Cambridge: Harvard University Press, 1937-1947), 1:736.

5. Michael Walzer, *The Revolution of the Saints: A Study in the Origins of Radical Politics* (New York: Atheneum, 1969), p. 10.

6. C. V. Wedgwood, "The Trial of Charles I," in *The English Civil Wars and After, 1642-1658,* ed. R. H. Parry (Berkeley and Los Angeles: University of California Press, 1970), pp. 58 and 42.

7. Charles Howard McIlwain, *The Growth of Political Thought in the West* (New York: The Macmillan Company, 1932), p. 386.

8. Ibid., p. 387.

9. Bryce Lyon, *A Constitutional and Legal History of Medieval England* (New York: Harper & Row, 1960), p. 649.

10. *State Trials,* ed. 1779, XI, 30-32, reprinted in G. W. Prothero, ed., *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I,* 4th ed. (Oxford: Clarendon Press, 1913), p. 341.

11. Petyt, *Jus Parliamentarium,* ed. 1739, pp. 227-243, reprinted in Prothero, *Select Statutes,* pp. 287-288.

12. McIlwain, *Political Thought,* p. 394.

13. The literature here is extensive. For excellent summaries see Willson H. Coates, "An Analysis of Major Conflicts in Seventeenth-Century England," in *Conflict in Stuart England: Essays in Honour of Wallace Notestein,* ed. William Appleton Aiken and Basil Duke Henning (New York: New York University Press, 1960), pp. 15-39; and Lawrence Stone, *The Causes of the English Revolution, 1529-1642* (New York: Harper & Row, Harper Torchbooks, 1972).

14. Stuart E. Prall, *The Bloodless Revolution* (Garden City, New York: Doubleday & Company, Inc., Anchor Books, 1972), pp. 248 and 251-252; J. H. Plumb, *The Growth of Political Stability in England, 1675-1725* (Baltimore: Penguin Books, Peregrine Books, 1969).

15. Abbott, *Oliver Cromwell,* p. 736.

16. Rushworth, *Historical Collections,* 7:1403.

17. Abbott, *Oliver Cromwell,* p. 736.

18. Quentin Skinner, "Conquest and Consent: Thomas Hobbes and the Engagement Controversy," in *The Interregnum: The Quest for Settlement, 1646-1660,* ed. G. E. Aylmer (London and Basingstoke: The Macmillan Press, Ltd., 1972), pp. 96 and 97; Thomas Hobbes, *Leviathan,* ed. C. B. Macpherson (Baltimore: Penguin Books, Pelican Classics, 1968), pp. 272 and 728.

19. Perez Zagorin, *A History of Political Thought in the English Revolution* (London: Routledge & Kegan Paul, 1954), pp. 184-186; Thomas Hobbes, *De Cive,* in *English Works,* ed. William Molesworth (John Bohn, 1841; Second Reprint: Scientia Verlag Aalen, 1966), 2:167.

20. Morton A. Kaplan, "How Sovereign Is Hobbes' Sovereign?" *Western Political Science Quarterly,* **9** (1956): 404 and 405.

21. Hobbes and Austin receive jointly McIlwain's disapproval. The complete sentence quoted in part above and cited in note 8 is as follows: "The English civil wars of the seventeenth century roughly threw English political thought permanently out of its true orbit and substituted a theory of might for a theory of law; and the English theory of sovereignty, as well as the American theory derived from it, has been eccentric ever since in its adherence to the ideas of Hobbes and Austin—a costly aberration, which lost for England one great colonial empire and would soon have lost another if practice had not fortunately departed from theory just before it was too late, and even within the realm had practical results scarcely less serious in their character" (*Political Thought,* p. 387). By the end of the decade of the 1930s, McIlwain's comments had become far more outspoken than this, testifying to his keen sense of the world's problems if not to his own dispassionate intellect. See his *Constitutionalism and the Changing World* (Cambridge: University Press, 1939), p. 33: "The results of this confusion of the sovereignty of the government and the *Allmacht* in the state have been by no means all of a theoretical kind. They are found in the sinister inference of Austinianism that 'what the sovereign permits he enjoins', and they have in fact led to an exaggerated *étatisme* which would deny legitimacy to all associations within the state which do not originate in or receive the imprimatur of 'the sovereign'." And on p. 43: "And is it not true that the *summa potestas* is limited by its nature, the nature of law—so limited in fact, that even the staunchest upholders of divine right admitted it in the seventeenth century, and in the thirteenth St. Thomas Aquinas applied the limitation to God himself? It was reserved for John Austin and his followers of the nineteenth and twentieth centuries to grant to a definite person or body of persons what St. Thomas denied even to God." And finally on p. 85: "A settlement of the far-reaching issues facing us

in America now, if it were to follow the lines of Filmer's and Austin's thought, might easily lead us to the arbitrary government based on popular support which lately tore up the Weimar Constitution and overrides all limitations in Germany to-day. Or shall we, instead, retain the view of Samuel Adams, that the constitution is fixed, and that the limits set in it cannot be overpassed, not even by the sovereign? If we do, we must be ready to accept the gibe that we are 'medieval', and in Professor Pollard's view, and Sir William Holdsworth's, undeveloped or 'rudimentary' when compared with Hobbes or Austin; but to a mere medievalist like myself such a gibe is not after all a very terrifying one. I venture therefore still to prefer Bodin to Hobbes, Hale to Blackstone, Camden to Mansfield, and Maitland to Holdsworth; and with Maitland I cannot but agree, though probably for very different reasons, that 'j.a.[John Austin] = 0°'. If it is distasteful to the modernist as a 'medieval restoration', I must ask him to make the most of it. For if his modernism is nothing more than a revamped Austinianism, probably the best present-day representative of it is Herr Hitler."

22. John Austin, *The Province of Jurisprudence Determined,* introduction by H. L. A. Hart (New York: The Noonday Press, 1954), p. 277n.